UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JAMES BEAZER,

Plaintiff,

REPORT AND
RECOMMENDATION
CV 15–4587 (JFB)(AYS)

-against-

NEW YORK STATE OFFICE OF MENTAL HEALTH, CREEDMOOR PSYCHIATRIC CENTER, ANN MARIE BARBAROTTA, VIODELDA HO-SHING, SUSAN ADAMS, VICTOR MARSHALL, RONALD ERMANN, DON HUFFMAN, John Doe, Jane Doe, Entity X,

Defendants.
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SHIELDS, Magistrate Judge,

Pro se plaintiff James Beazer ("Beazer" or "Plaintiff") commenced this action against defendants New York State Office of Mental Health ("OMH"), Creedmoor Psychiatric Center ("Creedmoor"), Anne Marie Barbarotta, Viodelda Ho-Shing, and Susan Adams, Victor Marchall, Ronald Ermann, and Don Huffman (collectively "Defendants"), alleging deprivation of his civil rights, discrimination and retaliation in connection with his employment, pursuant to the Thirteenth and Fourteenth Amendments of the United States Constitution, as well various federal statutes, inter alia, 42 U.S.C. § 1983 and 42 U.S.C. § 2000 et seq. On November 3, 2015, Plaintiff's Complaint and in forma pauperis ("IFP") application were dismissed with leave to file an amended complaint and an IFP application sufficient to cure the deficiencies in the original and proceed with the civil action. See Docket Entry ("DE") [6].

On November 23, 2015, Plaintiff filed an Amended Complaint, see DE [8], followed by an amended IFP application on August 17, 2016, see DE [10], which was granted on August 24, 2016. See DE [11].

Presently before this Court, upon referral by the Honorable Joseph F. Bianco for Report and Recommendation, see DE [28], is Defendants' motion to dismiss the Amended Complaint pursuant to Rules 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure. DE [24]. This Court respectfully recommends that the motion be granted and that Plaintiff be granted leave to replead with respect to his Title VII discrimination and retaliation claims as set forth below.

BACKGROUND

I. Documents Considered

As is required in the context of this motion to dismiss, the factual allegations in the Complaint, though disputed by Defendants, are accepted to be true for purposes of this motion, and all reasonable inferences are drawn therefrom in favor of the Plaintiff.

While facts to consider in the context of a Rule 12 motion to dismiss are generally limited to those set forth in the pleadings, a court may consider matters outside of the pleadings under certain circumstances. Specifically, in the context of a Rule 12(b)(6) motion, a court may consider: (1) documents attached to the Complaint as exhibits or incorporated by reference therein; (2) matters of which judicial notice may be taken; or (3) documents upon the terms and effects of which the Complaint "relies heavily" and which are, thus, rendered "integral" to the Complaint." Chambers v. Time Warner, Inc., 282 F.3d 147, 152-153 (2d Cir. 2002); see Int'l Audiotext Network, Inc. v. Am. Tel. and Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995). Moreover. "[a] court may take judicial notice of a documents filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and

related filings." Glob. Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006) (quoting Int'l Star Class Yacht Racing Ass'n Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998)).

Where, as here, the complaint was filed pro se, it must be construed liberally with "special solicitude" and interpreted to raise the strongest claims that it suggests. Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011) (internal quotation marks omitted). Nonetheless, a pro se complaint must state a plausible claim for relief. See Harris v. Mills, 572 F.3d 66, 73 (2d Cir. 2009).

The Court turns now to discuss the facts set forth in Plaintiff's Amended Complaint, construed in his favor.

II. Facts

A. Background

Beazer is employed at Creedmoor, a state psychiatric facility in Queens Village, New York, which is operated by OMH, as a Plant Utilities Assistant. See Am. Compl. ¶ 1. Plaintiff is also a member of the Civil Service Employee Association ("CSEA"). See Am. Compl. ¶ 2. In 2012, Creedmoor implemented a shift schedule change for certain employees. The change required employees, including Beazer, to take a half hour meal break and to sign out for the day one half hour later than was required under the previous schedule. See Affirmation of Susan Connolly ("Connolly Aff."), Ex. B., Amended Verified Petition, at 25-26, DE [24-4].[1] The change was required by the CSEA Operational Service Agreement. See id. at 26. On numerous

1. For ease of reference, page numbers for exhibits referenced herein are numbers assigned to pages on electronically filed documents, and not to the underlying documents themselves.

occasions Beazer failed to document his 30 minute meal break on his time sheets and also signed out for the day 30 minutes earlier than he should have based on his assigned shift. See id. at 27.

On July 23, 2013, after having repeated issues with the new shift policies Beazer was placed on administrative leave. See Connolly Aff., Ex. B at 28-33. On December 31, 2013, Beazer was suspended from employment. Id. In January 2014, Plaintiff filed a grievance and the matter proceeded to arbitration. See id. at 34-37. A hearing was scheduled for March 5, 2013 before Arbitrator Richard M. Gaba. See id. at 39.

Prior to the scheduled hearing, Plaintiff and his counsel agreed to OMH's settlement offer. See Connolly Aff., Ex. C., Arbitrator's Consent Award, DE [24-5]. The Arbitrator made a record of Plaintiff's acceptance and noted:

> The offer was stated for the record and under questioning by the Arbitrator [Beazer] stated that he understood the offer, had discussed it with his counsel, that he agreed to the offer of his own free will and was satisfied with the representation he received.

Id.

At the parties' request, the Arbitrator issued a consent award, dated March 6, 2015, that memorialized the terms of the settlement. See Connolly Aff., Ex. C. As part of the settlement. OMH agreed that it would no longer seek to terminate Beazer's employment at that time, return him to the payroll on March 5, 2015, and back at work no later than March 12, 2015. See id. OMH also agreed to restore certain "time credits" that Plaintiff had earned prior to his suspension. Id. In return, Beazer agreed to follow all time and attendance rules at Creedmoor. Id.

After returning to work, Plaintiff brought an Article 75 proceeding seeking to modify or vacate the consent Award. See Connolly Aff., Ex. B, Amended Verified Petition. Plaintiff's

Amended Petition was denied with prejudice. See Connolly Aff., Ex. D, November 18, 2015 Order with Notice of Entry, DE [24-6].

B. Procedural History

Plaintiff commenced this action on July 31, 2015. See Compl., DE [2]. By Order dated July 31, 2015, the action was transferred to this Court from the United States District Court for the Southern District of New York. DE [3]. On November 3, 2015, Plaintiff was directed to file an amended IFP application, providing this Court with adequate information to make a determination of indigence. DE [6]. On November 16, 2015, Plaintiff submitted an Amended IFP application, see DE [7], containing additional information. That application, however, did not allow the Court to make a finding of indigence. DE [9]. On November 23, 2015, Plaintiff filed an Amended Complaint but did not submit an amended IFP application. See DE [8]. On August 17, 2016, Plaintiff finally submitted an Amended IFP application, DE [10], which the Court granted on August 24, 2017. See DE [11].

On December 1, 2016, Defendants sought leave to file a motion to dismiss, see DE [20], which was granted on December 2, 2016. See DE [22]. Defendants then filed the instant motion to dismiss on January 6, 2017. See DE [24]. Upon briefing of the motion it was referred to this Court for report and recommendation. See DE [28].

C. Causes of Action

The Amended Complaint re-alleges causes of action pursuant to the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 2000 et seq., as well as alleging new causes of action stemming from various federal statutes, inter alia, 42 U.S.C. § 1983 and 42 U.S.C. § 1986. In sum and substance, broadly construed, Plaintiff's Amended Complaint asserts that the Defendants engaged in a fraud by suspending him without pay and not compensating him for overtime, thus engaging in unlawful employment practices. Plaintiff also alleges discrimination and retaliation in violation of Title VII, regarding the way he was treated while employed, including not being compensated for overtime and unequal pay.[2] See Am. Compl.

III. The Motion to Dismiss

Defendants move to dismiss all claims. Defendants first argue that Plaintiff has not properly served all of the Defendants. They assert that no service was effected on Ronald Ermann, Don Huffman, and Victor Marshall. Defendants further claim that no service was effectuated on the New York State Office of Mental Health/Creedmoor Psychiatric Center, and that the Office of the Attorney General was improperly served. Defendants also assert that Plaintiff has failed to administratively exhaust his Title VII claims because the Amended Complaint fails to state when he filed his EEOC charge, and no right to sue letter from the EEOC is attached to the Amended Complaint, thus rendering the Complaint defective on its face. Defendants further argue that the Eleventh Amendment bars Plaintiff's claims under 42 U.S.C. § 1983 and the Fourteenth Amendment. Defendants argue that the state is immune from suit and has not waived its absolute immunity. Likewise, they contend that Plaintiff's claims against the individual defendants in their official capacity are also barred under the Eleventh Amendment.

Additionally, Defendants argue that even assuming the veracity of Plaintiff's account of the events surrounding the Consent Award and his alleged deprivation of civil rights during his employment, Plaintiff has still failed to state a claim. Specifically, with respect to the arbitration

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2. The Court notes that while Plaintiff's Amended Complaint references "overtime compensation," even broadly construed, Plaintiff would be unable to plausibly allege any claim pursuant to the Fair Labor Standards Act, 29 U.S.C § 201 et seq., in the present operative complaint.

Consent Award concerning Plaintiff's suspension without pay from December 2013 through March 4, 2015, as well as the denial of his Article 75 Amended Petition in New York Supreme Court to modify the award, Defendants argue that Plaintiff's claims are barred under the doctrine of collateral estoppel. Defendants argue that Plaintiff has utilized the full extent of his rights in regard to the arbitration award.

Defendants also contend that Plaintiff's Title VII discrimination claims should be dismissed because Plaintiff has failed to prima facie show that age, color, race, religion, sex or national origin was a cause for the alleged discriminatory acts. Defendants argue that the Plaintiff's claims are vague and conclusory. Defendants further assert that the Title VII claims against the individual defendants are improper because individuals are not personally liable under Title VII. Defendants similarly argue that Plaintiff fails to state an Equal Protection clause violation because he fails to assert that he has been purposely discriminated against as compared to others who are similarly situated. Likewise, Defendants contend that Plaintiff's retaliation claim fails because he has not alleged causation, in that he fails to allege that Defendants knew about any of Plaintiff's complaints. Defendants further assert that Plaintiff's harmful acts occurred prior to his complaints, which militates against causality.

To date, the motion to dismiss remains unopposed. Having summarized the relevant facts, the Court turns to the merits of the motion.

DISCUSSION

I. Legal Principles: Standards Applicable on Motions to Dismiss

A. Rule 12(b)(5)

Pursuant to Rule 12(b)(5), "a complaint may be dismissed for insufficient service of process." Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de

C.V., 451 F. Supp. 2d 585, 589 (S.D.N.Y. 2006) (quoting Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 658 (S.D.N.Y. 1997)); see also Hawthorne v. Citicorp Data Sys., Inc., 219 F.R.D. 47, 49 (E.D.N.Y. 2003) ("Without proper service a court has no personal jurisdiction over a defendant."). On such jurisdictional matters, the plaintiff bears the burden of proof. See Commer v. McEntee, 283 F. Supp. 2d 993, 997 (S.D.N.Y. 2003) ("Once a defendant challenges the sufficiency of service of process, the burden of proof is on the plaintiff to show the adequacy of service.").

B. Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (quoting, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Arista Records, LLC v. Doe 3, 604 F.3d 110, 119–20 (2d Cir. 2010). Facial plausibility is established by pleading sufficient factual content to allow a court to reasonably infer the defendant's liability. Twombly, 550 U.S. at 556. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 555. Nor is a pleading that offers nothing more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," sufficient. Iqbal, 556 U.S. at 678 (2009) (quoting Twombly, 550 U.S. at 555).

District courts are "obligated to construe pro se complaint [s] liberally," Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009), interpreting them "to raise the strongest arguments that they suggest," Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006). Courts may not, however, read into pro se submissions claims inconsistent with the pro se litigant's allegations, Phillips v. Girdich, 408 F.3d 124, 127 (2d Cir. 2005) (citation omitted), or arguments that the submissions themselves do not "suggest," Pabon v. Wright, 459 F.3d 241, 248 (2d Cir. 2006). Pro se status "does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (citation omitted).

With these standards in mind, the Court turns to assess the viability of Plaintiff's claims.

II. Service of Process

The court will first address the insufficient service of process issue because "[b]efore a federal court may exercise jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." Omni Capital Int'l, Inc. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). Even where personal jurisdiction over a defendant is proper, the defendant must be properly served with notice of the action. Cf. Flick v. Stewart–Warner Corp., 76 N.Y.2d 50, 556 N.Y.S.2d 510, 555 N.E.2d 907, 910 (1990) (explaining that statutory requirements for service of process "are not mere procedural technicalities but measures designed to satisfy due process requirements of actual notice"). Here, Beazer has failed to oppose the instant motion and therefore makes not prima facie showing of adequate service. In any event, because, as discussed below, the Court recommends dismissing the Amended Complaint for failure to state a claim without prejudice to filing a second amended complaint, see infra Part III.C, should Beazer elect to file a second amended complaint, he is directed to serve it properly pursuant to Federal Rule of Civil Procedure 4, as if it was the initial pleading in this action.

A. Insufficient Service of Process

Federal Rule of Civil Procedure 4 governs service of process. Regarding the method of service, Rule 4, in turn, incorporates state law methods. Rule 4(c)(1) requires that "a summons must be served with a copy of the complaint." See Fed. R. Civ. P. 4(c)(1). New York law provides that service upon a state-created governmental organization must be effected by delivering the summons and complaint to its chief officer or in accordance with N.Y. C.P.L.R. § 307. New York law also provides that service upon the Office of the Attorney General requires either personal service or service by certified mail, return receipt requested, to the chief executive officer or his designee(s) at a principal office of the agency. C.P.L.R. § 307(2). If service is made by certified mail, the front of the envelope must bear the legend "URGENT LEGAL MAIL" in capital letters. Id. The "plaintiff bears the burden of proving adequate service." Burda Media, Inc. v. Viertel, 417 F.3d 292, 298 (2d Cir. 2005) (citation omitted). The plaintiff must, "through specific factual allegations and any supporting materials, make a prima facia showing that service was proper." Kwon v. Yun, 2006 WL 416375, at *2 (S.D.N.Y. Feb. 21, 2006). The court may "look to matters outside the complaint to determine whether it has jurisdiction." Darden v. DaimlerChrysler N. Am. Holding Corp., 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002).

In the instant action, a review of the docket indicates that no service was effected on individual defendants Ronald Ermann, Don Huffman, and Victor Marshall. See DE [13]. [17], [18], [19]. Likewise, the docket reflects that no service was effected on OMH, and that the Office of the Attorney General was not properly served.

B. Consequences of Inadequate Service

Defendants argue that Beazer's failure to serve the Amended Complaint within the proscribed 90 days requires the court to dismiss the action against OMH and three of the individual defendants. See Defs.' Opp. at 12. Federal Rule of Civil Procedure 4(m) provides:

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). While Defendants characterize the rule as requiring dismissal if service is not completed within 90 days, the Second Circuit has interpreted Rule 4(m) "to give wide latitude to courts in deciding when to grant extensions on time to serve, including permitting courts to grant extensions even absent good cause." Gerena v. Korb, 617 F.3d 197, 201 (2d Cir. 2010). As discussed below, pursuant to Rule 4, the court recommends ordering that proper service of the second amended complaint, if any, be made expeditiously.

III. Failure to State a Claim

A. The Eleventh Amendment

According to the Defendants, under the Eleventh Amendment of the United States Constitution and the principles of sovereign immunity, this Court lacks subject matter jurisdiction over this lawsuit, because (1) the Plaintiff brings this action solely against the Defendants in their official capacities and (2) the Plaintiff makes no request for prospective relief to address ongoing constitutional violations.

The Court agrees that the Eleventh Amendment and principles of sovereign immunity bars the Plaintiff's lawsuit and, therefore, recommends dismissing the Plaintiff's claims under 42 U.S.C. § 1983 and the Fourteenth Amendment with prejudice. As an initial matter, the Court first observes that within the Second Circuit, the question of whether a motion to dismiss made on sovereign immunity grounds should be reviewed under Rule 12(b)(1) or under Rule 12(b)(6) remains unresolved. See Carver v. Nassau Cnty. Interim Fin. Auth., 730 F.3d 150, 156 (2d Cir. 2013) ("[W]hether the claim of sovereign immunity constitutes a true issue of subject matter jurisdiction or is more appropriately viewed as an affirmative defense is an open question in the Supreme Court and the Second Circuit.") (citing Wisc. Dep't of Corr. v. Schacht, 524 U.S. 381, 391, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)); see also

Garcia v. Paylock, 2014 WL 298593, at *2 n. 3 (E.D.N.Y. Jan. 28, 2014) ("It is an open question in the Second Circuit whether the claims of sovereign immunity should be viewed as raising a question of subject matter jurisdiction, and thus be evaluated under Rule 12(b)(1), or as an affirmative defense analyzed under Rule 12(b)(6).").

Of importance, this "distinction is significant," because "while [a district court] must accept all factual allegations in a complaint as true when adjudicating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), ... in adjudicating a motion to dismiss for lack of subject-matter jurisdiction [pursuant to Fed. R. Civ. P. 12(b)(1)], a district court may resolve disputed factual issues by reference to evidence outside the pleadings, including affidavits." State Employees Bargaining Agent Coal. v. Rowland, 494 F.3d 71, 77 (2d Cir. 2007) (citations omitted). As such, in accordance with the approach taken by other district courts within this Circuit, the Court will apply the stricter standard set under Fed. R. Civ. P. 12(b)(6) while analyzing Defendants' sovereign immunity arguments. See Tiraco v. New York State Bd. of Elections, 963 F. Supp. 2d 184, 191 n. 6, 2013 WL 4046257, at *4 n. 6 (E.D.N.Y. 2013) (noting that "[t]his distinction [ ] does not alter the outcome" of the case because "the court [ ] considered only the pleadings and the relevant state and federal law and [drew] all inferences in Plaintiff's favor") (citations omitted); McMillan v. N.Y. State Bd. of Elections, 2010 WL 4065434, at *3 (E.D.N.Y. Oct. 15, 2010) (looking "only to the pleadings and to state and federal law" to resolve questions regarding sovereign immunity).

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI; see also Gollomp v. Spitzer, 568 F.3d 355, 365 (2d Cir. 2009). "Although by its terms the Amendment applies only to suits against a State by citizens of another State," the Supreme Court has consistently "extended the Amendment's applicability to suits by citizens against their own States." Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 363, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (collecting cases); see also Daigneault v. Judicial Branch, Connecticut, 309 F. App'x 518, 519 (2d Cir. 2009) ("[T]he Eleventh Amendment bars suits against a nonconsenting state in federal court brought by a state's own citizens or citizens of another state.") (citing Edelman v. Jordan, 415 U.S. 651, 662–63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)); CSX Transp., Inc. v. New York State Office of Real Prop. Servs., 306 F.3d 87, 94 (2d Cir. 2002) ("In addition to its explicit restriction of suits by 'Citizens of another State,' the Eleventh Amendment has been construed to protect an unconsenting state from suit by its own citizens.'") (quoting Edelman, 415 U.S. at 662–63, 94 S. Ct. 1347); Tiraco v. New York State Bd. of Elections, 963 F. Supp. 2d 184, 191, 2013 WL 4046257, at *4 (E.D.N.Y. 2013) ("The Supreme Court has long held that the Eleventh Amendment bars suits against a state by one of its own citizens.") (citing Hans v. Louisiana, 134 U.S. 1, 10–11, 10 S. Ct. 504, 33 L. Ed. 842 (1890)).

In other words, "the Eleventh Amendment means that, as a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogated the states' Eleventh Amendment immunity when acting pursuant to its authority under Section 5 of the Fourteenth Amendment." Gollomp, 568 F.3d at 366 (citation and internal quotation marks and alterations omitted); see also Miller v. Carpinello, 2007 WL 4207282, at *2 (S.D.N.Y. Nov. 20, 2007) ("The Eleventh Amendment bars suits in federal court by citizens against a state and its agencies, absent waiver of immunity and consent to suit by the state or abrogation of constitutional immunity by Congress.").

Further, a suit for damages against a state official in his or her official capacity "is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state." Ying Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir. 1993); see also Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989); Ford v. Reynolds, 316 F.3d 351, 354 (2d Cir. 2003). However, "the applicability of the Eleventh Amendment bar [to suits against individuals in their official capacities] depends on the form of relief sought." Lee v. Dep't of Children & Families, 939 F. Supp. 2d 160, 165–66 (D. Conn. 2013). Money damages cannot be recovered from state officers sued in their official capacities. See e.g., Will, 491 U.S. at 71, 109 S. Ct. 2304 ("[A] suit against a state official in his or her official capacity is not a suit against an official but rather is a suit against the official's office."); Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); Goonewardena v. New York, 475 F. Supp. 2d 310, 329 (S.D.N.Y. 2007) ("[S]overeign immunity also extends to bar claims for monetary damages brought against state officers sued under section 1983 in their official capacities.").

Similarly, "judgments against state officers declaring that they violated federal law in the past" are also not permitted. Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993) (citing Green v. Mansour, 474 U.S. 64, 73, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985)). However, prospective injunctive relief is available against individuals being sued in their official capacities in order to correct an ongoing violation of federal law. See Edelman, 415 U.S. at 663, 94 S. Ct. 1347; Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). In this regard, through the doctrine of Ex Parte Young, a party may bring "a suit for injunctive [or declaratory] relief challenging the constitutionality of a state official's actions in enforcing state law." CSX Transp., Inc., 306 F.3d at 98 (internal quotation marks and alteration omitted); see also Arthur v. Nyquist, 573 F.2d 134, 138 (2d Cir. 1978).

In this case, none of the Plaintiff's causes of action seek prospective relief from this Court to address an ongoing violation of federal law. The Eleventh Amendment bars claims under Section 1983 or under the Fourteenth Amendment against the State of New York or one of its agencies regardless of the relief sought. As Plaintiff has brought a suit for damages against the individual defendants in their official capacity, the Court likewise lacks subject matter jurisdiction to entertain such claims.

In sum, the Plaintiff's claims pursuant to 42 U.S.C § 1983 and the Fourteenth Amendment are barred by the Eleventh Amendment and principles of sovereign immunity.

B. Collateral Estoppel

Defendants also argue that Plaintiff's claims are barred by issue preclusion, also referred to as collateral estoppel, which "bars relitigation of an issue when (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action." Evans v. Ottimo, 469 F.3d 278, 281 (2d Cir. 2006) (citing Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455-56, 482 N.E.2d 63, 492 N.Y.S.2d 584 (1985)). The "fundamental notion [of collateral estoppel] is that an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies." United States v. Alcan Aluminum Corp., 990 F.2d

711, 718-19 (2d Cir. 1993) (emphasis in original); see also Wells Fargo Bank, N.A. v. Ullah, 2014 WL 470883, at *4 (S.D.N.Y. Feb. 6, 2014) (pursuant to issue preclusion, "[a]fter a New York court decides an issue in a given case, no party to that case may dispute the same issue in a new lawsuit."). Collateral estoppel also applies to arbitration awards and prevents relitigation of an issue "if (a) the identical issue was raised in the prior proceeding, (b) the issue in the prior proceeding was actually litigated and decided, (c) there was a full and fair opportunity to litigate in the prior proceeding, and (d) the issue previously litigated was necessary to support a valid and final judgment on the merits." Sathianathan v. Smith Barney, Inc., 2006 WL 538152, at *17 (S.D.N.Y. Feb. 24, 2006); see also Mitra v. Global Fin. Corp., 2010 WL 1529264, at *1 (E.D.N.Y. Apr. 15, 2010). "One who, though not a party of record, controls in furtherance of his own self[-]interest the conduct of adjudicatory proceedings by or against another is bound by the result of the proceeding." Ritchie v. Landau, 475 F.2d 151, 155 n.2 (2d Cir. 1973) (determining that company's stockholder and CEO who "clearly participated as an active 'non party'" in company's arbitration and "effectively controlled the development" of company's litigation would "probably be bound by the award against" the company). Defendants argue that claims with regard to the arbitration consent award concerning Plaintiff's suspension without pay from December 2013 through March 4, 2015 may not be relitigated here. The Court agrees.

In the instant action, Plaintiff participated in and actually consented to the Arbitration Award while represented by counsel. Moreover, Beazer utilized the full extent of his rights in regard to the arbitration award by filing an Article 75 Petition in New York Supreme Court to modify the award, which was denied. Accordingly, this Court recommends that any claims stemming from the Arbitration Consent Award be precluded and dismissed with prejudice.

C. Exhaustion of Administrative Remedies

It is well established that Title VII requires a plaintiff to exhaust administrative remedies before filing suit in federal court. See Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 126 (2d Cir. 2010) (citing 42 U.S.C. § 2000e5(e) and (f)); Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 274 F.3d 683, 686 (2d Cir. 2001) (same). Before a federal court may consider a Title VII claim, a plaintiff must first exhaust administrative remedies by filing a charge with the EEOC or an appropriate state agency within 300 days of the unlawful discriminatory act. 42 U.S.C. § 2000e-5(e)(1). "The purpose of this exhaustion requirement is to give the administrative agency the opportunity to investigate, mediate, and take remedial action." Brown v. Coach Stores, Inc., 163 F.3d 706, 712 (2d Cir. 1998) (internal quotation marks omitted). The administrative exhaustion requirement applies to pro se and counseled plaintiffs alike. See Pikulin v. City Univ. of N.Y., 176 F.3d 598, 599-600 (2d Cir. 1999).

"Exhaustion of administrative remedies through the EEOC is an essential element of the Title VII ... statutory scheme[ ]"; accordingly, it is "a precondition to bringing such claims in federal court." Legnani, 274 F.3d at 686 (internal quotation marks omitted); see also Deravin v. Kerik, 335 F.3d 195, 200 (2d Cir. 2003) ("As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies...."). The weight of precedent demonstrates that administrative exhaustion is not a jurisdictional requirement; rather, it is merely a precondition of suit and, accordingly, it is subject to equitable defenses. Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 385 (2d Cir. 2015); Francis v. City of New York, 235

F.3d 763, 768 (2d Cir. 2000)(internal quotation marks omitted); see also Boos v. Runyon, 201 F.3d 178, 182 (2d Cir. 2000) (analyzing the statutory structure of Title VII to conclude that "the exhaustion requirement, while weighty, is not jurisdictional").

Here, Plaintiff's Amended Complaint fails to allege compliance with the timeliness and exhaustion requirements of Title VII. Further, Plaintiff has failed to attach to the Amended Complaint a right to sue letter from the EEOC. Additionally, because Plaintiff has not opposed the instant motion, it is unclear to this Court whether the Plaintiff has exhausted the administrative remedies, and if he has not, whether any equitable principles may excuse Plaintiff's failure to exhaust. Thus, at this stage it is unclear to this Court whether Plaintiff's Title VII claims are properly before the Court. Accordingly, the Court recommends that should Plaintiff elect to file a second amended complaint for any surviving Title VII claims, Plaintiff is directed to properly plead exhaustion of administrative remedies.

D. Title VII Discrimination Claims

Defendants argue that the Plaintiff cannot establish a prima facie case on his discrimination claims because the allegations of discrimination are bereft of any specific factual allegations.

As a general matter, Title VII claims are analyzed using the familiar, burden-shifting framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Littlejohn v. City of New York, 795 F.3d 297, 307 (2d Cir. 2015). The first step of this framework requires that, to prove his claims, the plaintiff will ultimately be required to prove a prima facie case of discrimination based on race or retaliation. Specifically, he will be required to prove that he

> (1) is a member of a protected class; (2) was performing his duties satisfactorily; (3) was discharged [or otherwise suffered an adverse employment action]; and that (4) his discharge [or the other adverse employment action] occurred under

> circumstances giving rise to an inference of discrimination on the basis of his membership in the protected class [or retaliation].

Graham v. Long Island R.R., 230 F.3d 34, 38 (2d Cir. 2000); see also Locorriere v. NBTY, Inc., 2016 WL 625618, at *5 (E.D.N.Y. Feb. 17, 2016) (describing broader Title VII prima facie case requirement, to include adverse employment actions beyond discharge, and to include retaliation claims).

However, a plaintiff need not plead a prima facie case of discrimination to survive a motion to dismiss. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002). Rather, in the absence of direct evidence of discrimination, a plaintiff must only allege facts that "plausibly support[ ] that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and [that offer] at least minimal support for the proposition that the employer was motivated by discriminatory intent." Littlejohn, 795 F.3d at 311. As to the last prong, the facts pled need only give "plausible support to a minimal inference of discriminatory motivation." Id. at 311. The Second Circuit has identified several ways in which plaintiffs may "alleg[e] facts that ... indirectly show discrimination by giving rise to a plausible inference of discrimination." Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 87 (2d Cir. 2015). These allegations could include:

> the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge; or the timing of the discharge.

Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994) (citations omitted).

Defendants argue that Plaintiff has failed to allege that anyone employed by OMH made derogatory remarks to him about his age, race, color, religion, sex or national origin, or told him that he was being treated less well as a result. Plaintiff does not allege what the age, race, color, religion, sex or national origin of any other employees are. Moreover, Plaintiff doesn't even identify himself in this regard. Defendants further argue that Plaintiff has failed to plausibly allege that any of the adverse employment actions against him occurred giving rise to an inference of discrimination. The Court agrees.

The court agrees that Beazer has not alleged any facts plausibly supporting a minimal inference of discriminatory motive. Merely describing events leading up to a change in work schedule and suspension, and arguing that the work schedule change and suspension were unfair, without alleging any facts suggesting a discriminatory motivation behind the two events, is not sufficient to give rise to inferences of discrimination. See Am. Compl. ¶¶ 11-17. Thus, this Court respectfully recommends that Plaintiff's Title VII discrimination claims against OMH be dismissed without prejudice.

Plaintiff has also alleged Title VII claims against the individual defendants. Title VII does not permit personal liability for individuals, including supervisors and agents of employers. See Blige v. City Univ. of N.Y., 2017 WL 498580, at *8 (S.D.N.Y. Jan. 19, 2017) (citation omitted); Palmer v. Shchegol, 2016 WL 5678544, at *5 (E.D.N.Y. Sept. 30, 2016) (citation omitted); accord Guerra v. Jones, 421 F. App'x 15, 17 (2d Cir. 2011) (summary order) (Title VII does not subject individuals, "even those with supervisory liability over the plaintiff, to personal liability.") (citation omitted). Accordingly, Plaintiff's Title VII claims against the individual defendants are dismissed with prejudice.

E. Retaliation

Title VII prohibits retaliation against an employee who "has opposed any practice [that is] made an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-(3)(a). Retaliation claims are analyzed under the McDonnell Douglas burden-shifting framework. See Littlejohn, 795 F.3d at 315. To establish a prima facie case of retaliation, a plaintiff must show: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." Id. at 316 (quoting Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010)).

As with other claims analyzed under the McDonnell Douglas framework, at the pleadings stage the allegations need only give "plausible support to the reduced prima facie requirements." Id. "Thus, for a retaliation claim to survive ... a motion to dismiss, the plaintiff must plausibly allege that: (1) [the] defendants discriminated—or took an adverse employment action—against [him], (2) 'because' he has opposed any unlawful employment practice." Vega, 801 F.3d at 90. To sufficiently allege that a defendant-employer took an adverse employment action "because" a plaintiff opposed an unlawful employment practice, a plaintiff "must plausibly allege that the retaliation was a 'but for' cause of the employer's adverse action." Id. But-for causation does not require that retaliation "was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." Id. at 91 (quoting Zann Kwan v. Andalex Grp., LLC, 737 F.3d 834, 846 (2d Cir. 2013)).

Defendants assert that Plaintiff's retaliation claim fails because Plaintiff fails to allege causation. The Court agrees.

Broadly interpreted, Plaintiff's complaints "of retaliation and discrimination on the part of Barbarota, Ermann, Ho-Shing and OMHCPC for providing information, objections to unlawful policies, making charges and violations to the U.S. Attorney General, New York State Attorney General, etc." can be construed as Plaintiff's protected activity. See Am. Compl. ¶ 13. However, Plaintiff has failed to allege that Defendants reacted with any retaliatory animus because of these complaints, or even knew about these activities. Further, Plaintiff alleges that the harmful acts, namely his suspension, occurred prior to his complaints, which militates against causality here. See Bernard v. J. P. Morgan Chase Bank N.A., 2010 WL 423102, at *17 (S.D.N.Y. Feb. 5, 2010) ("When discipline or expressed dissatisfaction with job performance has taken place before the plaintiff engages in a protected activity, a causal nexus does not exist between the protected activity and a subsequent adverse action. Otherwise, an employer who institutes progressive discipline would never be free of a claim of retaliation, so long as the employee complained about unfairness.") (citations omitted).

Because Defendants' warnings against Plaintiff began prior to him engaging in any protected activity, Plaintiff cannot show a causal connection between his complaints and the warnings and suspension. It follows that Plaintiff cannot establish a prima facie case of unlawful retaliation at this time. Accordingly, this Court recommends that Plaintiff's retaliation claims be dismissed without prejudice.

IV. State-Law Claims

Under 28 U.S.C. § 1367(a), "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." However, courts "may decline to exercise supplemental jurisdiction over a claim" if "the district court has dismissed all claims over which it has original jurisdiction." Id. § 1367(c); (c)(3); see Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 245 (2d. Cir. 2011). The Supreme Court explained: "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

Here, given the absence of a federal-law claim, the interests of judicial economy, convenience, fairness, and comity weigh in favor of not exercising supplemental jurisdiction at this time. If Plaintiff elects to file a second amended Complaint, Plaintiff may replead any potential state-law claims. Accordingly, at this time, this Court further recommends that the Court refrain from exercising supplemental jurisdiction over any potential state-law claims contained in Plaintiff's Amended Complaint

V. Leave to Amend

The Second Circuit has cautioned that, when a liberal reading of a pro se complaint "gives any indication that a valid claim might be stated," the district court should not dismiss the complaint without granting leave to amend. Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation marks omitted); see Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). It is well settled, however, that "leave to amend a complaint need not be granted when amendment would be futile." Ellis v. Chao, 336 F.3d 114, 127 (2d Cir. 2003); see Cuoco

v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (holding that a "futile request to replead," even by a pro se litigant, "should be denied"). An amendment is "futile" if the proposed pleading would not withstand a motion to dismiss. See Jones v. Phelps Corp., 2014 WL 2195944, at *3 (N.D.N.Y. May 22, 2014). Thus, the proposed amended complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Barnhart v. Town of Parma, 252 F.R.D. 156, 158 (W.D.N.Y. Sept. 15, 2008) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Applied here, the Court recommends that Plaintiff should be given the opportunity to attempt to replead the claims dismissed without prejudice. See, e.g., Cuoco v. Mortisugu, 222 F.3d 99, 112 (2d Cir. 2000) ("[T]he court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." (internal quotation marks and citation omitted)); see also Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.") Accordingly, this Court respectfully recommends that Plaintiff be granted leave to file a second amended complaint limited to his Title VII causes of action.

CONCLUSION

For the foregoing reasons, this Court respectfully recommends that Defendants' motion to dismiss be granted with prejudice as to Plaintiff's 42 U.S.C. § 1983 and the Fourteenth Amendment claims, Plaintiff's Title VII discrimination claims against the individual defendants, as well as any claims arising from the Arbitration Consent Award. However, this Court respectfully recommends that Plaintiff's Title VII discrimination claim against OMH as well as his Title VII retaliation claims against all Defendants be dismissed without prejudice and that

Plaintiff be given leave to replead his Title VII discrimination claim against OMH and Title VII retaliation claims as well as any potential state-law claims. This Court further recommends that Plaintiff be cautioned that if he elects to file a second amended complaint, service must be properly effectuated on all Defendants.

OBJECTIONS

A copy of this Report and Recommendation is being provided to Defendants' counsel via ECF. Furthermore, the Court directs Defense counsel to (1) to serve a copy of this Report and Recommendation by first class mail to Plaintiff at his last known addresses, and (2) to file proof of service on ECF within two days. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of filing of this report. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the District Judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals. Thomas v. Arn, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive right to appeal."); Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision").

Dated: Central Islip, New York
June 5, 2017

/s/ Anne Y. Shields
Anne Y. Shields
United States Magistrate Judge